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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1244

RADIO CORPORATION OF AMERICA,

Petitioner,

—against—

SCM CORPORATION,

Respondent.

PETITION FOR REHEARING OF DENIAL OF WRIT OF CERTIORARI

JOHN F. SONNETT
Attorney for Petitioner
Radio Corporation of America
80 Pine Street
New York, New York 10005

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Petitioner Radio Corporation of America ("RCA") respectfully requests that the Court grant rehearing and reconsider its order of June 9, 1969, which denied RCA's petition for a writ of certiorari to the Court of Appeals for the Second Circuit.

The ground on which reconsideration is sought is that, after denying certiorari, the Court rendered an opinion in *Perkins* v. *Standard Oil Co. of California*, 37 U.S.L.W. 4581 (U.S. June 16, 1969), which undermines the authorities relied upon by the courts below in dismissing RCA's antitrust counterclaim. For example, those authorities relied on a line of cases which held that a lessor cannot, as a matter of law, recover for rentals he lost as a result of antitrust injuries to his lessee. In *Perkins*, this Court held that such a lessor is entitled to recover. Accordingly, we respectfuly request that the Court either review the decision below, or remand this action to the Court of Appeals for reconsideration in light of *Perkins*.

The Injury to Petitioner Was Intended

In a patent litigation brought by SCM Corporation ("SCM"), RCA counterclaimed under the antitrust laws for injunctive relief against the injury inflicted upon it by SCM's continuing monopolization of the Electrofax markets. The lower courts dismissed RCA's counterclaim, as a matter of law, on the ground that even if RCA could prove every fact alleged, including that SCM had violated the antitrust laws for the purpose of injuring RCA's patent licensing business, RCA still has not been threatened with "loss or damage" sufficient to support an injunction under Section 16 of the Clayton Act, 15 U.S.C. § 26.

RCA alleged, and is prepared to prove, that far from being an "incidental" victim of SCM's monopolization, RCA was one of the principal intended objects of SCM's activities. RCA developed the Electrofax method of document reproduction, and owns patents applicable to that method as well as the paper and machines involved in it. Rather than manufacturing and selling Electrofax machines and paper, RCA decided to license all applicants on a non-discriminatory basis under its patents, thus attempting to create open competition in the Electrofax markets, which, RCA believed, would produce more widespread use of the Electrofax process than would non-competitive markets. SCM's course of conduct has been, however, directed to obtaining such control over those markets that RCA would be confronted by a single dominant licensee who could then demand, as SCM later did, that RCA grant it discriminatory royalty rates for the purpose of eliminating the remaining competition, and otherwise obtain reductions in its royalty payments by use of its increased bargaining position.

The Courts Below Denied Petitioner Any Relief

Although the lower courts conceded that RCA's injury was "perhaps very real", they concluded that since RCA was a patent licensor, such injury was "under the authorities", chiefly *Productive Inventions, Inc.* v. *Trico Products Corp.*, 224 F.2d 678 (2d Cir. 1955) *cert. den.* 350 U.S. 936 (1956), too "indirect" to support a lawsuit; beyond citing "the authorities", no attempt was made to justify or explain them in light of the purposes served by the antitrust laws.

The Perkins Decision Conflicts With The Opinions Below

Perkins has, however, effectively overruled the foundations on which the *Trico* case, and thus the opinions below, were based.

Trico relied on cases holding that "shareholders and officers of corporations, as well as creditors and landlords, have been held not to have standing to sue for treble damages", and held that "the situation here presented is akin to the cases above cited", 224 F.2d at 679. The *Trico* Court placed particular emphasis on *Harrison* v. *Paramount Pictures Inc.*, 115 F.Supp. 312 (E.D.Pa. 1953), *aff'd per curiam* 211 F.2d 405 (3d Cir.) *cert. den.* 348 U.S. 828 (1954), which held that a gross receipts lessor could not recover whether or not his lessee had been a party to the conspiracy to reduce the receipts of the particular leased motion picture theatre.

In *Perkins*, this Court noted that plaintiff should be permitted to recover damages he suffered as a lessor of gasoline stations to corporations whose business was reduced as a result of Standard Oil's violations, as a creditor of the injured corporations, and as a broker for those corporations. The catalogue of supposedly analogous situations relied on in *Trico* was thus destroyed by *Perkins*,

and if, as *Perkins* holds, landlords and creditors may be permitted to recover in certain circumstances, it should follow that patent licensors may be equally worthy plaintiffs. At the very least, we submit, the action should not be dismissed, as was done here, on the pleadings without any opportunity for development of the facts.

The *Perkins* approach also conflicts strongly with the type of reasoning used in *Trico*. In *Trico* and its predecessors, the courts resolved the issue of standing to sue by classifying formal legal relationships. *Perkins* refused to adopt such formalistic analysis.

First, as will be recalled, the Court in *Perkins* rejected the notion that under § 2(a) of the Robinson-Patman Act, any causal connection between a supplier's price discriminations and trade practices at the third level of distribution was necessarily too indirect to support a finding of liability. The Court declined to accept "such an artificial limitation", holding instead that "[i]f there is sufficient evidence in the record to support an inference of causation, the ultimate conclusion as to what the evidence proves is for the jury".

Secondly, the Court held that Mr. Perkins could have recovered for his losses as a broker, a creditor, and a landlord of corporations which had been injured by Standard Oil's price discriminations, since Mr. Perkins was "no mere innocent bystander", but rather a chief object of the violations, regardless of the precise legal relationship between his losses and Standard Oil's violations. That ruling simply cannot be reconciled with the long line of cases, of which *Trico* is only one example, which determined such issues by mechanical classifications.

The present case cannot, we submit, simply be classified as a "patent licensor" case, and thus unworthy of judicial

attention. RCA has alleged, and will prove, that it was one of the principal objects of SCM's monopolization, that its business of patent licensing has been directly injured by that monopolization, and that those injuries are continuing. This, we submit, ought to entitle RCA to seek at least injunctive relief against SCM's continuing violations of the antitrust laws.

CONCLUSION

For these reasons, it is respectfully urged that the Court grant rehearing and grant the petition for certiorari, and either itself review the decision below or remand the case to the Court of Appeals for the Second Circuit for reconsideration in light of *Perkins* v. *Standard Oil, Inc. of California*.

Dated: July 3, 1969.

Respectfully submitted,

JOHN F. SONNETT
Attorney for Petitioner
Radio Corporation of America
80 Pine Street
New York, New York 10005

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in Rule 58(2) of the Rules of this Court.

July 3, 1969

/s/ JOHN F. SONNETT
John F. Sonnett